Supreme Court, U. S.
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No. 80-160

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN A. RUSECKAS, *Petitioner,*

v.

HOWARD A. GUNSTEN, T/A GUNSTEN AGENCY,
AND
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. Is this the proper forum in which to seek re-examination and reversal of factual questions which were decided adversely to the petitioner, John A. Ruseckas, in the trial court and on the appellate level?

II. John Hancock Company is not liable to John Ruseckas under the veteran's reemployment rights act, 38 U.S.C. §2021, et seq., because it is not an employer of John Ruseckas within the meaning of the act, and because there was no proof it did anything to violate the act.

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STATEMENT OF CASE

The respondent Hancock is a company with assets and annual sales of $100 million, which sells and services life insurance policies through designated agents. (Transcript, p. 178) The respondent Gunsten was a General Agent of the respondent Hancock under a contract prepared by Hancock. (Appendix, p. 42) The General Agent would contract with individuals to become special agents under a Special Agent's Commission Agreement prepared by Hancock. (A. 49)

Hancock, as an aid to the General Agent, developed a method of financing for new agents. The

terms of this subsidy program are contained in the Stabilized Earnings Program Amendment (Financed Agent). (A. 55) The concept of the subsidy program is to aid the new special agent in learning his profession without having to concern himself with commission income. It is an aid to train the special agent and to assist him during the initial difficult years in the business until he develops clientele. The subsidy program enables the General Agent to attract individuals who have substantial earnings. (T. 362-3) In essence, Hancock advances money to the General Agent to pay to the special agent's fortnightly subsidy and, in return, the General Agent has a liability to Hancock if the special agent does not complete the program. (T. 236-8; A. 55)

Although, technically, Hancock was required to approve each subsidized agent, petitioner's witness, Neal Cory, testified that, in nineteen years, Hancock had never withheld approval of any agency contract he had submitted. (T. 257)

In early 1977, the petitioner responded to a newspaper advertisement for a full-time position with Gunsten. (T. 33 and 112) As a result, Gunsten contracted with the petitioner to be a subsidized agent. Initially, the petitioner was approved for a $550 fortnightly subsidy based upon verified wages from his previous employment. (T. 42, 116, 305-9, 364) The petitioner desired an additional $50, and was required to provide additional verification of his past earnings in the Reserves. On or about April 1, 1977, the respondent Gunsten informed the petitioner that the $600 biweekly subsidy had been approved. (T. 115-19, 364-65)

There was a major conflict in the evidence as to whether the petitioner had indicated that he planned on terminating his military reserve participation at these in-

itial interviews. (T. 116-20, 303-4, 361-2) Petitioner's performance was unsatisfactory, which prompted a meeting on June 3, 1977, between petitioner, Gunsten and Adolph Kunen, who was the petitioner's immediate supervisor. This meeting was to discuss petitioner's lack of production and his absences from the job. (T. 56-7, 313-14) The meeting concluded with the petitioner stating that he would lessen his reserve activity and attempt to transfer to a reserve unit in the Washington area. (T. 58-9, 314-16)

Gunsten, Ruseckas and Kunen again met on July 29, 1977. Gunsten sought to find out if Ruseckas had found a less active reserve component, as they had discussed at the June 3 meeting. (T. 361-67, 372-73) Ruseckas stated that he did not intend to leave the Reserves, and had made only one informal inquiry regarding transfer to another reserve unit. This individual was a retired Air Force officer who had no connection with the Reserve program. (T. 135) Gunsten informed the petitioner that he could have until the end of September to provide evidence that he was seriously attempting to transfer to a local reserve unit. (T. 66-7, 373) On the next working day, August 1, 1977, the petitioner tendered his resignation to Gunsten.

In August, Ruseckas contacted the Department of Labor regarding a claim against Gunsten. (T. 85) On October 4, 1977, a meeting was held with the Department of Labor personnel, Ruseckas, Gunsten and Kunen. At the urging of the Department of Labor mediators, Gunsten agreed to take back Ruseckas if Ruseckas limited his military reserve activity to the minimum requirements to maintain currency in aircraft. (T. 139, 375-77 and Defendant's Exhibit 45) Due to Ruseckas' resignation and his change of residence from

Maryland to Virginia, his insurance license was not reissued until the middle of November. (T. 95, 376-79) Ruseckas reported to work on November 21, 1977; however, being obligated for a military flight, Ruseckas did not report for work again until November 28, 1977. (T. 98-9) On November 28, 1977, Ruseckas remained at work approximately three hours, and he resigned the following day. (T. 156) Petitioner stated that his resignation was due to intolerable working conditions. (T. 91-3. 95-6, 146-55) The working conditions were described and explained at length by Gunsten. (T. 379-92)

Contrary to petitioner's claim that he had an 'auspicious start' in the insurance business, he barely placed four policies within his first three months, as required under his subsidy agreement. Of these four policies, one was issued on himself and another on his daughter, whose address he did not know. (T. 127-31, 317-20, 371) For the entire period of activity, the petitioner was credited with a total of nine-and-one-half policies. (T. 408-9) Six-and-one-half of these policies resulted from leads given to Ruseckas by Gunsten. Each of these six-and-one-half policyholders were Hancock policyholders whom the petitioner had merely sold again. (T. 379-80) Resultingly, only one policy sold by the petitioner, excluding the policies on himself and his daughter, was the result of a lead developed by the petitioner. (T. 380)

In October, 1978, the petitioner instituted this action by filing a Complaint in the United States District Court for the Eastern District of Virginia. Petitioner's Complaint contained seven causes of action as follows:

1. A claim against Gunsten under the Veterans' Reemployment Rights Act, 38 U.S.C. 2021, *et seq.*, for allegedly forcing petitioner to resign;

2. A claim against the respondent Hancock for acquiescing in Gunsten's violation of the Veterans' Reemployment Rights Act, which allegedly constituted a separate violation;

3. A claim for defamation against Gunsten under Section 8.01-45, Virginia code (1950), as amended, and under the common law;

4. A claim for breach of contract against the respondent Gunsten;

5. A claim against both respondents under Section 1 of the Sherman Act for an unlawful agreement in restraint of trade;

6. A claim against both respondents under Section 1 of the Sherman Act that the petitioner had been 'blacklisted,' and

7. A hybrid claim against Gunsten under the Veterans' Reemployment Rights Act, the common law and the aforementioned section of the Virginia Code.

The first two claims were merged into one count against both respondents for violation of the Veterans' Reemployment Rights Act. The fifth, sixth and seventh claims were merged into a single claim against both respondents for violation of Section 1 of the Sherman Act. (T. 268-69)

The case proceeded to trial before the Honorable John A. MacKenzie. After petitioner had concluded his case, Judge MacKenzie dismissed the antitrust claim on the grounds that there had been absolutely no evidence of a 'blacklist' or a conspiracy. (T. 291-93) Also, Judge MacKenzie dismissed the claim against Hancock under the Veterans' Reemployment Rights Act. The stated basis for the ruling was that the petitioner was relying

solely on the actions of Hancock after November 28, 1977. (T. 293-94)

The respondent Gunsten proceeded to introduce evidence on the remaining claims for defamation, breach of contract and violation of the Veterans' Reemployment Rights Act. Following the conclusion of evidence, the jury was instructed on the claims for defamation and breach of contract. Following deliberation, the jury returned their verdict in favor of Gunsten on both causes of action. (T. 501) The jury verdict was not appealed and is final. (A. 11) On May 4, 1979, Judge MacKenzie issued a Memorandum Order denying petitioner's claim for relief against Gunsten under the Veterans' Reemployment Rights Act. (A. 5)

Petitioner appealed the rulings of the Trial Court to the United States Court of Appeals for the Fourth Circuit. On May 1, 1980, in a *per cuream* opinion, the Appellate Court affirmed the District Court's decision in its entirety. On the issue of petitioner's claim under the Veterans' Reemployment Rights Act, the Appellate Court stated:

> The jury, as well as the district court, found the appellant's resignation to have been an act of free will, and we find no evidence in the record contrary to this finding.
>
> Before a party is deemed to have waived his rights under the Veterans' Act there must be clear and cogent proof that the waiver was knowledgeable and voluntary. (citations omitted) We cannot imagine an act which shows waiver more clearly than voluntarily walking off the job.

It is this ruling of the Appellate Court from which the petitioner has sought a writ of certiorari.

ARGUMENT

I.

Initially, it must be noted that the decisions of the Trial Court and the Appellate Court hinge entirely on the factual issues presented in this case. The primary legal issue presented in this case was whether the Veterans' Reemployment Rights Act was applicable. Without deciding the issue, the Fourth Circuit Court of Appeals assumed the Act to be applicable for purposes of its opinion. The issue, as framed by the Appellate Court, was whether Ruseckas' termination on November 30, 1977, was the result of a voluntary act resulting from harassment or duress by his employer. This was the identical issue which was decided by the jury and the trial judge. In his Memorandum Order of May 4, 1979, District Court Judge, John A. MacKenzie, stated:

> They [The jury] were also told that if they found that Ruseckas left on November 30 as the result of harassment or arbitrary or capricious conditions inflicted by Gunsten upon Ruseckas' return to work, in such event, they should find that his leaving his employment was not voluntary and they should find for the plaintiff upon that claim.

The jury, in determining there was no breach of contract, found, necessarily, that plaintiff left voluntarily on November 30, 1977, and was not pressured in that decision by any harassment, or arbitrary or capricious conduct on the part of the defendant.

> Such decision is certainly advisory to the Court, but even without the jury decision on that question, this Court, on its own assessment of the evidence, concludes that Ruseckas left his employment voluntarily.

In his Order, Judge MacKenzie examined the evidence in support of this factual conclusion. Judge MacKenzie made special note of the fact that he found Ruseckas lacking in credibility.

The Appellate Court recognized that before a party can be deemed to have waived any rights under the Veterans' Reemployment Rights Act, there must be clear and cogent proof that the waiver was knowledgeable and voluntary. *Smith* v. *Missouri Pacific Transportation Company*, 313 F.2d 676 (8th Cir. 1963); *Wright* v. *Ford Motor Company*, 196 F. Supp. 538 (E.D. Mich. 1961) Following a brief recitation of the pertinent facts on this issue, the Appellate Court stated that there was absolutely no evidence in the record which would support a finding that Ruseckas' resignation was involuntary or the result of any conduct of the respondents.

Petitioner has sought the jurisdiction of this Court to re-argue factual issues which have been decided adversely to his interest by the jury, Judge MacKenzie and the Court of Appeals. Petitioner has argued, as was argued before the District Court, that the reinstatement of Ruseckas in November, 1977, was a sham, since he was not provided with a validation date. The entire petition is premised upon speculation and conjecture. Throughout these proceedings, petitioner has sought a ruling that the failure to provide him with a validation date during the three-and-one-half hours which he worked is sufficient ground for him to terminate his sales activity and constitutes an involuntary resignation on his part.

Petitioner has asserted that the decision below is in conflict with cases from other federal courts. A review of the cases cited by petitioner belies this conclusion. Petitioner has cited *Hanna* v. *American Motors Cor-*

poration, 557 F. 2d 118 (7th Cir. 1977) for the proposition that a resignation, deemed voluntary under the common law, would be a discharge under the Veterans' Act, if the resignation were provoked by the employer's withholding of an advantage of employment due to Armed Services Activities protected under the Act. In fact, the Court in *Hanna* made no finding that the resignation of the employee was voluntary under the common law. The Court found that the plaintiff's refusal to continue in the inferior status accorded him by the defendant was not a waiver. *Id.* at 122. In the present case, the lower courts have made the factual finding that Ruseckas' resignation was not the result of any denial of benefit to him by his employer, but an independent action evidencing a voluntary and knowledgeable waiver.

In furtherance of this argument, petitioner has cited a Pennsylvania District Court case as holding that a resignation demanded on account of impending military service constituted a discharge under the Veterans' Act. *Witter* v. *Pennsylvania National Guard*, 462 F. Supp. 299 (E.D. Pa. 1978) The court addressed this issue in a footnote, stating:

> Whether or not plaintiff was told that his job would be available upon his return from active duty, and whether or not he was advised to resign rather than request a military leave of absence are matters which are irrelevant to the issue before this court. Id. at 301.

The circumstances surrounding plaintiff's 'resignation,' military duty in Vietnam and reinstatement were not at issue. The issues before the Pennsylvania court concerned whether plaintiff was a federal or state employee and whether the Veterans' Act should be accorded retroactive effect.

The same is true of the final case cited by petitioner. *Peel* v. *Florida Dept. of Transportation*, 443 F.Supp 451 (N.D. Fla. 1977) Nowhere in the opinion of the court is it suggested that by not coming to work the employee had abandoned his position. The issue in *Peel* was whether a Florida statute permitting seventeen days of military leave annually could restrict the provisions of the Veterans' Reemployment Rights Act.

Clearly, the lower courts' decisions in the present case do not conflict with rulings from other circuit and district courts. The present case was decided solely on a factual basis which was not remotely relevant to the decisions cited by the petitioner. Throughout his petition, the petitioner has assumed the factual determinations of the trial judge and jury to be erroneous and argued the law accordingly. He has argued that his resignation was the result of the actions of the respondents and, consequently, he should be afforded remedies under the Veterans' Reemployment Rights Act. This Honorable Court should not permit the petitioner to re-argue the factual issues upon which the decision of the lower court is predicated.

II.

The coverage of the Veterans' Reemployment Rights Act is limited by §2021(a) to a person who "leaves a position (other than a temporary position) in the employ of an employer" in order to perform military training and service. Thus, the Act applies, by its own terms, only in situations where the employer-employee relationship exists.

The interpretation of the Act has been confirmed by the courts. *See, eg., King* v. *Southwestern Greyhound Lines, Inc.*, 169 F.2d 497 (10th Cir. 1948),

where the court held that the right of a former bus depot agent to reinstatement under the Veterans' Reemployment Rights Act was dependent on whether he was an employee or an independent contractor. In that case, the court concluded that the plaintiff was an employee within the terms of the Act.

In this case, the relationship of Ruseckas to John Hancock Company is defined by the parties themselves as that of an independent contractor. Paragraph 2 of the Special Agent's Commission Agreement, which Ruseckas signed (A. 50), expressly states:

> Nothing herein contained shall be construed to create the relation of employer and employee between the parties hereto or between either of them and the [John Hancock] Company.

It has already been established in previous sections of this brief that Ruseckas was not an employee of the Gunsten Agency, but an independent contractor, the test being the right of control over the supposed employee. The relationship of Ruseckas to John Hancock Company is even further removed from that of employer and employee.

The plaintiff produced no evidence that the John Hancock Company had anything to do with the circumstances under which he was hired, any knowledge of his military activities, or the events leading to his leaving the Gunsten Agency. After he left the Gunsten Agency in late July, 1977, Ruseckas wrote a letter to Mr. James Kean, a field vice-president of the John Hancock Company, asking if Kean could mediate his dispute with Gunsten. (T. 84) Kean replied that he had no control over the relationship between Gunsten and its agents. After Ruseckas left the Gunsten Agency a second time

in November, 1977, he again requested Kean to intervene in his relationship with Gunsten. Kean told him he had to work the matter out with Gunsten. (T. 172)

Thus, Ruseckas has not established and cannot establish that he was an employee of the John Hancock Company. Nor can he establish that the John Hancock Company denied him any rights because of his military service. The evidence establishes that the John Hancock Company consistently refused to interfere in any way in the relationship between Gunsten and Ruseckas. Were there any evidence that Ruseckas was in any sense an employee of John Hancock Company, there is no evidence it violated the Veterans' Reemployment Rights Act by denying him any benefit because of his military service.

CONCLUSION

The respondents respectfully request this Honorable Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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